

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
: 19-cr-850 (JSR)
-v- :
: ORDER
PARKER H. PETIT, :
: 19-cr-850 (JSR)
Defendant. :
-----x

JED S. RAKOFF, U.S.D.J.

Defendant is an 82-year old man under treatment for a variety of conditions including bladder cancer that have left him immunocompromised. He is scheduled to surrender to the custody of the Bureau of Prisons on September 21, 2021 to serve a one-year sentence imposed pursuant to a jury's conviction on November 19, 2020. The Court has received the Defendant's letter, which is filed under seal along with supporting medical documentation and which is docketed in redacted form along with this Order to protect sensitive medical information. Defendant makes the following applications, set forth more fully in his sealed letter, none of which the Government opposes:

1. Direct the Probation Office to amend Petit's pre-sentence report to include certain information regarding his current medications and treatment protocols in the section labeled "Physical Condition";
2. Recommend to the Bureau of Prisons that Petit be allowed to bring a supply of certain medications with him to prison and be permitted to access a sustained supply of that medication

to ensure that his cancer treatment can continue without interruption; and

3. Extend Petit's surrender date by one month, to October 21, 2021 at 2:00 p.m. to enable him to obtain a third, booster dose of the COVID-19 vaccine before entering prison.

The Court hereby grants Defendant's applications. A full statement of the medical information to be added to Petit's pre-sentence report is contained in his sealed letter application, which the Court will transmit to the Probation Office.

SO ORDERED

Dated: New York, NY
September 7, 2021



JED S. RAKOFF, U.S.D.J.



Shapiro Arato Bach LLP

500 Fifth Avenue, 40th Floor New York, NY 10110
phone: 212-257-4880 | fax: 212-202-6417
www.shapiroarato.com

Alexandra A.E. Shapiro
ashapiro@shapiroarato.com
Direct: 212-257-4881

September 3, 2021

Honorable Jed S. Rakoff
United States Courthouse
500 Pearl Street, Room 1340
New York, NY 10007

Re: *United States v. Parker H. Petit, No. 19 Cr. 850 (JSR)*

Dear Judge Rakoff:

We write on behalf of defendant Parker H. Petit, who is currently due to report to prison by September 21, 2021. Although Mr. Petit is prepared to serve his prison sentence, as Your Honor is aware, he has been battling bladder cancer for over three years and is now 82 years old. We write with two applications relating to the unique challenges and heightened risks posed by Mr. Petit's impending incarceration given his medical condition and age, particularly in light of the coronavirus (COVID-19) pandemic.

First, we have recently come to understand that the Bureau of Prisons (BOP) is unlikely to permit Mr. Petit to continue his current bladder cancer treatment—which is medically necessary and has proven profoundly effective—unless the Presentence Investigation Report (PSR) is amended as described below and the Court makes a recommendation to the BOP that Mr. Petit be allowed to continue the treatment. We therefore respectfully request that the Court direct the Probation Office to amend the PSR accordingly and that the Court make the appropriate recommendation to the BOP before Mr. Petit reports to prison.

Second, the current surge in the Delta variant of the coronavirus and its well-documented spread through the federal prisons presents a particularly acute risk to Mr. Petit, whose immune system is already compromised. In fact, Mr. Petit's designated facility, Butner, has experienced an especially high incidences of infection and fatalities. In light of Mr. Petit's unique circumstances, we respectfully request that the Court extend his surrender date by one month, to October 21, 2021 so that—at a minimum—Mr. Petit can receive a COVID-19 vaccine booster shot before reporting to prison.

We have conferred with Probation Officer Robert Flemen and AUSAs Scott Hartman and Daniel Tracer. As discussed below, neither the Probation Office nor the government objects to these requests.

A. Amendment of the PSR and Recommendation to BOP Regarding Mr. Petit's Panacur Bladder Cancer Treatment

As the PSR explains,

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As Dr. Libby and Dr. William H. Whaley explain in the attached letters, Mr. Petit has responded extremely well to a medication called [REDACTED]

[REDACTED] In order to ensure that the BOP allows Mr. Petit to continue his daily Panacur treatment, we respectfully ask that the Court direct the Probation Office to amend Mr. Petit's PSR to reference the attached letters and note the importance of Mr. Petit's continued daily [REDACTED] treatments. Similarly, we ask that the PSR be amended to reflect the treatments that Dr. Whaley urges in his letter be continued in prison to effectively address Mr. Petit's other conditions, namely: [REDACTED]

Further, we respectfully ask the Court to recommend to the BOP that Mr. Petit

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We have conferred with Mr. Petit's Probation Officer, who indicated that the Probation Office defers to the Court with respect to this request. The government similarly takes no position regarding this request.

C. Extension of Surrender Date in Light of Acute Covid Risks

Due to the uncertainty caused by the currently surging coronavirus Delta variant among unvaccinated and vaccinated people alike, and the ongoing risk of severe infection among people like Mr. Petit who are over 80 years old and immunocompromised, we respectfully ask that the Court extend Mr. Petit's surrender date by one month, to October 21, 2021. This will enable him to at least receive a booster shot, for which he will be eligible as of October 9, 2021. This might also allow the Butner facility to improve its processes and reduce the risk of Covid infection among inmates and staff.

There has been a "recent surge in the pandemic as a result of the spread of the Delta variant." *United States v. Robles*, No. 08 CR. 1114 (PAE), 2021 WL 3524067, at *8 (S.D.N.Y. Aug. 10, 2021). Coronavirus cases increased 18% in the last two weeks of August 2021 and deaths increased 75%. N.Y. Times, Coronavirus in the U.S.: Latest Map and Case Count (updated Sept. 2, 2021), <https://www.nytimes.com/interactive/2021/us/covid-cases.html>. "Delta is currently the predominant strain of the virus in the United States." CDC, Delta Variant: What We Know About the Science, <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>. As expected by the increasing number of cases, the "Delta variant is highly contagious, more than 2x as contagious as previous variants." *Id.*

Mr. Petit received the second dose of the Pfizer vaccine on February 9, 2021. But while vaccinations offer some protection, unlike previous variants of the coronavirus, "the Delta variant seems to produce the same high amount of virus in both unvaccinated and fully vaccinated people." *Id.* For example, in August 2021, at least three United States senators who were vaccinated have tested positive and had symptoms, as has Texas Governor Greg Abbott, who was also previously vaccinated. N.Y. Times, Three Vaccinated Senators Have Tested Positive for the Virus (Aug. 19, 2021), <https://www.nytimes.com/2021/08/19/us/politics/roger-wicker-angus-king-covid-positive.html>; CNN, Texas Gov. Greg Abbott Tests Positive for COVID-19 (Aug. 17, 2021), <https://www.cnn.com/2021/08/17/politics/texas-governor-greg-abbott-covid-19/index.html>. Data from Israel shows a marked decline in vaccine efficacy after six months, with effectiveness in preventing infection and symptomatic illness as low as 64%. NPR, Highly Vaccinated Israel Is Seeing a Dramatic Surge in New COVID Cases. Here's Why (Aug. 20, 2021), <https://www.npr.org/sections/goatsandsoda/2021/08/20/1029628471/highly-vaccinated-israel-is-seeing-a-dramatic-surge-in-new-covid-cases-heres-why>; Israel Ministry of Health Press Release: Decline in Vaccine Effectiveness Against Infection and Symptomatic Illness (May 7, 2021), <https://www.gov.il/en/departments/news/05072021-03>.

Although severe infection is more common among the unvaccinated, so-called "breakthrough" infections in vaccinated individuals can cause serious complications. To-date there have been 2,063 COVID deaths among vaccinated people and an additional 8,987 non-fatal hospitalizations. CDC, COVID-19 Vaccine Breakthrough Case Investigation and Reporting (updated Aug. 23, 2021), <https://www.cdc.gov/vaccines/covid-19/health-departments/breakthrough-cases.html>. The majority of these people (88% and 70%, respectively) were sixty-

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five and older. *Id.* These numbers will continue to grow as the number of breakthrough infections rises nationally. *Id.*

In addition, immunocompromised individuals such as Mr. Petit remain at risk regardless of vaccination status. People who have a weakened immune system have a decreased ability to fight infections and have a higher susceptibility to viruses for two reasons: (1) their immune system may not be strong enough to fight infection on its own; and (2) their immune system may not be sufficiently strengthened by a vaccine to fight infection. VCU Health, COVID-19, Delta and the Immunocompromised: Will Booster Shots Help? <https://www.vcuhealth.org/news/covid-19/covid-19-delta-and-the-immunocompromised>. “Data show that people who are immunocompromised do not respond to the current vaccines as robustly as people who are not immunocompromised.” *Id.* Weakened immune systems can be caused by underlying medical conditions and treatments such as bladder cancer, as Dr. Libby explains in the attached letter. Similarly, people lose immunity as they get older. For this reason, adults 80 and older are at a particular risk for COVID-19. Mayo Clinic, What Older Adults Should Know About Being Vaccinated for COVID-19 (Feb. 1, 2021), <https://newsnetwork.mayoclinic.org/discussion/what-older-adults-should-know-about-being-vaccinated-for-covid-19/>.

On top of this, “[p]risons are tinderboxes for infectious disease.” *United States v. Jeremy Rodriguez*, No. 03 Cr. 271 (AB), ECF Docket No. 135 (E.D. Pa. Apr. 1, 2020) (granting inmate’s compassionate release motion and collecting research explaining the greater risk of infectious disease spread in detention facilities). By nature, prisons keep people together, and use communal spaces for living and eating—which is precisely opposite from the guidance of the Center for Disease Control (CDC) to socially distance from others. *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>; *see also* Laura Hawks et al., *COVID-19 in Prisons and Jails in the United States*, JAMA Internal Medicine (Apr. 28, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2765271> (explaining how the infrastructure of a prison is conducive to spreading disease). Even before the spread of the contagious Delta variant, the rate of COVID-19 cases in prisons was more than four times that of the general population and the COVID-19 mortality rate in prisons was twice as large as that of the general U.S. population. National Commission on COVID-19 and Criminal Justice, COVID-19 in U.S. State and Federal Prisons (2020), https://build.neoninspire.com/counciloncj/wp-content/uploads/sites/96/2021/07/FINAL_Schnepel_Design.pdf. Recognizing the risk of severe infection despite vaccination status, federal district courts have granted compassionate release to vaccinated people—like Mr. Petit—who have underlying health conditions that create a risk that the vaccine will be less effective. *See, e.g., United States v. Sawyer*, No. 5:15-CR-160-BO-1, 2021 WL 3051985, at *2 (E.D.N.C. June 15, 2021); *United States v. Cavelly*, No. 00-CR-157-TCK, 2021 WL 2843833, at *4 (N.D. Okla. July 7, 2021); *United States v. Weissinger*, No. 1:06 CR 132 CDP, 2021 WL 2252824, at *5 (E.D. Mo. June 2, 2021).

Federal Correctional Complex Butner, where Mr. Petit is due to serve his sentence, has had a particularly severe mortality rate: Far more COVID-related deaths (33 total, including one staff member) have occurred at Butner than at any other BOP facility (the next closest being Springfield (20) and Forth Worth (15)), according to the BOP website, <https://www.bop.gov/coronavirus/> (last visited Sept. 3, 2021). Consistent with the national trend of increasing

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coronavirus cases, cases are rising in BOP and at Butner in particular. As of September 2, 2021, 528 federal inmates and 492 Bureau of Prisons staff currently have coronavirus. *Id.*

At Butner FMC—the particular unit to which Mr. Petit has been assigned—7 inmates and 5 staff members currently have coronavirus. *Id.* These numbers will surely rise as, BOP is no longer requiring vaccinated individuals to be tested for COVID-19 or to quarantine when they are admitted to BOP. BOP COVID-19 Operation Levels, https://www.bop.gov/coronavirus/covid19_modified_operations_guide.jsp.

Postponing Mr. Petit's surrender date by one month will allow additional time for the current surge at FMC Butner to subside.¹ Additionally, because of his medical condition and age, Mr. Petit is in the population of severely immunocompromised individuals that the CDC strongly recommends receive a coronavirus vaccine booster shot, and he is eligible to receive a booster shot starting October 9 (eight months after his second vaccination shot). We have no information to indicate that the BOP is administering, or will administer, Covid booster shots, and, in any event, even if Mr. Petit could receive a booster shot while in prison, by that point he would already have been exposed to the prison population and staff. Extending Mr. Petit's surrender date will also enable him to receive that critical booster shot before he reports to prison. Finally, the extension will afford ample time for the PSR to be amended in the manner described above.

The government does not object to this request.

* * *

Accordingly, we respectfully request that the Court:

1. Direct the Probation Office to amend Mr. Petit's PSR to include the following additional information after current paragraph 104 (which appears in Part C, under "Physical Condition"):

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¹ Mr. Petit has requested that the BOP change his facility designation from Butner to FMC Lexington, so that his wife and other family members will be able to visit him more easily and so that he can have access to the cancer center at the University of Kentucky. We understand that such requests are rarely granted, however. (Lexington had significant Covid issues earlier in the pandemic and just recently reported four staff members with active Covid cases.)

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b. [REDACTED]

2. Recommend to the Bureau of Prisons that Mr. Petit [REDACTED]
[REDACTED]
3. Extend Mr. Petit's surrender date from September 21, 2021 to October 21, 2021 at 2:00 p.m.

Mr. Petit sincerely thanks the Court for its consideration.

Respectfully submitted,



Alexandra A.E. Shapiro

Attachments

cc: AUSA Scott Hartman (via email)
AUSA Daniel Tracer (via email)
Probation Officer Robert Flemen (via email)